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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JIMMY C. CHISUM,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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57pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the procedural validity of the underlying assessment, which the Respondent admitted was invalid and the Ninth Circuit Court of Appeals found was invalid, has a bearing on whether disclosure of return and return information is authorized under the provisions of Internal Revenue Code (IRC), § 6103(k)(6)?

2. Whether the Petitioner is required to establish that the disclosures were made in bad faith before the Respondent comes forward with evidence that the disclosures were the result of a "good faith, but erroneous, interpretation of section 6103"?

THE PARTIES

The only parties are those who appear in the caption of the case.

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NO.

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ON PETITION FOR WRIT OF CERTIORARI TO
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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jimmy C. Chisum, hereby Petitions this Court for its Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 24, 1994.

OPINION OF THE COURT BELOW

Both the opinion of the Ninth Circuit Court of Appeals (App. A, Pgs. A-1 to A-3) and the United States United District Court (App. C, Pgs. A-9 to A-16) were unpublished opinions and are included in the Appendix. The decision of the Ninth Circuit is noted at 19 F.3d 26

JURISDICTION

The Ninth Circuit Court of Appeals originally entered judgment on September 13, 1993 (App. B, Pgs. A-5 to A-7) affirming the district Court's grant of summary judgment. That judgment is noted at 5 F.3d 535. On September 24, 1993, the Petitioner timely filed a Petition for Rehearing. The Ninth Circuit denied the Petition for Rehearing on January 24, 1994. However, it withdrew its September 13, 1993 judgment and entered a new memorandum disposition. (App. D, Pg. 17)

On February 5, 1994, the Petitioner filed a Petition for Rehearing with a suggestion for Rehearing *en banc*. On May 11, 1994, the Court of Appeals denied the Petition for Rehearing as to the January 24, 1994 memorandum disposition and rejected the suggestion for rehearing *en banc*. (App. E, Pg. 19) The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari is invoked under the provisions of 28 USC, § 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutes and regulations are involved in this action.

Sec. 6212. Notice of Deficiency.
(a) In general.

If the Secretary determines that there is a deficiency in respect of any tax imposed by subtitle A or B or chapter 41, 42, 43 or 44, he is authorized to send notice of such deficiency to the taxpayer by certified mail or registered mail.

(b) Address for Notice of Deficiency.

(1) Income and gift taxes and certain excise taxes. In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43 or chapter 44, if mailed to the taxpayer at his **last known address** shall be sufficient for purposes of subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, chapter 44 and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence. (emphasis added)

Sec. 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment

"Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after a Notice of Deficiency authorized under Section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day), the taxpayer may file a petition with the United States Tax Court for a redetermination of the deficiency. Except as otherwise provided in Section 6851, 6852 or 6861, **no assessment** of a deficiency in respect of any tax imposed by subtitle A, B, chapter 41, 42, 43 or 44 and **no levy** or proceeding in Court for its collection shall be made, until such notice has been mailed to the taxpayer, nor until the expiration of the 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning

of such proceeding or levy during the time of such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition. (emphasis added)

Sec. 7431. Civil damages for unauthorized disclosure returns and return information.

(a) In General.

(1) Disclosure by employee of United States. If any officer or employee of the United States knowingly, **or by reason of negligence**, discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States. (emphasis added)

(b) No liability for good faith but erroneous interpretation.

No liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103.

(c) Damages

In any action brought under subsection (a), upon a finding of liability on the part of the defendant, the defendant shall be liable to the Plaintiff in an amount equal to the sum of --

(1) the greater of --

(A) $ 1,000 for each act of unauthorized disclosure of a return or return information with respect to which such defendant is found liable, or

(B) the sum of -- **(i)** the actual damages sustained by the Plaintiff as a result of such unauthorized disclosure, plus, **(ii)** in the case of a willful disclosure or a disclosure which is the result of gross negligence, punitive damages, plus

(2) the costs of the action.

(d) Period for bringing action.

Notwithstanding any other provision of law, an action to enforce any liability under this section may be brought, without regard to the amount in controversy, at any time within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure.

Sec. 6103. Confidentiality and disclosures of returns and return information.

(a) General Rule.

Returns and return information shall be confidential, and except as authorized by this title --

(1) no officer or employee of the United States

(2) no officer or employee of any State, any local support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section, and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), (l)(12), paragraph (2) or (4)(B) of subsection (m), or subsection (n),

shall disclose return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term "officer or employee" includes a former officer or employee.

(b) Definitions -- For purposes of this section --

(2) Return Information -- The term "return information" means -

(A) a taxpayer's identity, the nature source, or amount of his income, payments, receipts, deductions, credits, assets, liabilities, net worth, tax liabilities, tax withheld, deficiencies, over-assessments, or tax payments, whether the taxpayer's return was, is being or will be examined or subject to other investigation or processing, or an other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense, and

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b) which is not open to public inspection under section 6110,

but such term does not include data in a form which cannot be associated with, or otherwise identify, directly or indirectly, a particular taxpayer. Nothing in the preceding sentence, or in any other provision of law, shall be construed to require the disclosure of standards used or to be used for the selection of returns for examination, or data used for determining such standards, if the Secretary determines that such disclosure will seriously impair assessment, collection, or enforcement under the internal revenue laws.

(k) Disclosure of certain returns and return information for tax administration purposes.

(6) Disclosure by internal revenue officers and employees for investigative purposes. An internal revenue officer or employee may, **in connection with his duties relating to** any audit, collection activity, ... disclose return information to the extent **such disclosure is necessary in obtaining information**, which is not otherwise reasonably available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation. (emphasis added)

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26 CFR, § 301.6103(k)(6)-1. Disclosure of return information by internal revenue service officers and employees for investigative purposes.

(b) ***Disclosure of return information in connection with official duties relating to examination, collection activity, civil or criminal investigation, enforcement activity, or other offense under the internal revenue laws.*** In connection with the performance of official duties relating to any examination, collection activity, civil or criminal investigation, enforcement activity, or other offense under the internal revenue laws, an officer or employee of the Service or Office of the Chief Counsel therefor is authorized to disclose return information (as defined in section 6103(b)(2)) in order to **obtain necessary information** relating to the following --

(6) To establish or verify the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets

in which the taxpayer has an interest, to ascertain the amount of any liability described in subparagraph (3) of this paragraph to be collected, or otherwise to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability. (emphasis added)

STATEMENT OF THE CASE AND FACTS

On or about March 8, 1988, the Internal Revenue Service (IRS) seized real property allegedly belonging to Petitioner in an attempt to satisfy an October 14, 1985 assessment alleged to have been made for 1983. The assessment arose from a deficiency that had allegedly been determined against the Petitioner. The Notice of Deficiency was sent to the Petitioner by certified Mail on May 24, 1985. The Commissioner of Internal Revenue, or one of his delegates, mailed the Notice of Deficiency to the Petitioner at P.O. Box 14955, Phoenix, Arizona 85063 (P.O. Box Address). (App C, Pg. A-10) Petitioner's "last known address" for purposes of IRC, § 6212 (b)(1) was 4544 West Continental Drive, Glendale, Arizona 85308 (Continental Address). (App. A, Pg. A-3)

A Notice of Lien was recorded on or about December 16, 1986 in the Office of the County Recorder, in Maricopa County, Arizona. (App. C, Pg. A-10). The Petitioner did not discover the Notice until April 18, 1988. On or about March 21, 1988, the Respondent caused several Notices of Sale to be sent the prospective bidders. (App. C, Pg. A-10). The Notices of Sale were also published in various newspapers on April 10, 11 and 12, 1988. (App. C, Pg. A-10). The information disclosed in the Notice of Lien and the Notices of Sale was return information (App. A, Pg. A-2; App. C., Pg. A-10)

The Petitioner commenced this action on April 10, 1990 in the United States District Court in the District of Arizona arising from the disclosure of return information in the Notice of Lien and the Notices of Sale that had been sent to prospective bidders and which were published in various newspapers throughout the

State of Arizona and in particular Maricopa County. (App. C, Pg. A-10). He sought damages for the unauthorized disclosure of return and return information in violation of IRC, §§ 6103 and 7431.[1]

On or about September 13, 1991, the parties filed cross motions for summary judgment[2]. On December 6, 1991, the district Court, without determining if the Deficiency Notice had been properly mailed, granted summary judgment in favor of the Respondent and dismissed the action. (App. C, Pg. A-9 to A-15) The district Court found that the action was time barred as to all disclosures, notwithstanding the fact that the action was begun within two years of the disclosures made in the newspapers.[3] The district Court further found that even if the action was not time barred, they were authorized under the provisions of IRC, § 6103(k)(6), since they disclosures arose out of tax collection activity. (App. C., Pg. A-12 to A-14). Finally, in denying the Petitioner's Motion for Partial Summary Judgment, the Court found that the Petitioner failed to prove the disclosures made by the Respondent were made in bad faith. (App. C, Pg. A-14)

The Petitioner timely appealed the district Court's decision. On September 13, 1993, the Ninth Circuit initially affirmed the district Court's grant of summary judgment on the ground that the action was time barred. (App. B, Pg. A-5 to A-7). Like the district Court the Ninth Circuit failed to give consideration to

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1/ Jurisdiction was invoked in the district Court under 28 USC, §§ 1331, 1340 and 1346 and IRC, § 7431(a).

2/ The Petitioner only sought partial summary judgment on the question of liability under IRC, § 7431(a). The number of disclosures had not been discovered or determined by the parties as of the time of the filing of the motions.

3/ Although the district Court found, in its findings of fact, that disclosures had been made on April 10, 11 and 12, 1988 (App. C, Pg. A-10) when the Notices of Sealed Bid Sale were published in the various newspapers, the Court failed to consider these disclosures when it concluded that the action was time barred in Part I.A of its order. (App. C, Pg. A-11)

the disclosures that had occurred on April 10, 11, and 12, 1988. The Court of Appeals also ignored the fact that the Respondent conceded, in its appeal brief, the existence of factual dispute over whether the action was time barred. On September 24, 1993, the Petitioner timely filed a Petition for Rehearing identifying the Court's failure to address the April 10, 11, and 12, 1988 disclosures and the Respondent's concession that there was a factual dispute over this issue. Although the Court denied the Petition for Rehearing on January 24, 1994, the Court withdrew its September 13, 1993 memorandum disposition and ordered the clerk to file the new memorandum opinion that was attached to the order. (App. D, Pg. A-17)

In its appeal brief, the Respondent also conceded that the P.O. Box Address was not the Petitioner's "last known address" as set forth in IRC, § 6212(b)(1), and therefore, the Notice of Deficiency was insufficient. Based upon this conclusion the Respondent conceded that the assessment and lien were invalid. The Ninth Circuit also noted in its January 24, 1994 memorandum opinion that the "government concedes error in the mailing of the notice of deficiency and states that therefore, the assessment and tax lien against Chisum were improper and subsequently released." (App. A, Pg. A-3). Notwithstanding the Respondent's concession and the Appellate Court's findings that the assessment was invalid, the Ninth Circuit affirmed the district Court's grant of summary judgment on essentially the same grounds as the district Court. That is, the disclosures were authorized under IRC, § 6103(k)(6). (App. A, Pg. A-3) The Ninth Circuit also found that there was no evidence to show that the disclosures were not made in good faith. (App. A, Pg. A-3)

On February 5, 1994, the Petitioner timely filed a Petition for Rehearing with a suggestion of Rehearing *en banc*. On May 11, 1994, the Appellate Court denied the Petition for Rehearing and rejected the suggestion of Rehearing *en banc*. (App. E, Pg. A-19) It is the January 24, 1994 judgment of the Ninth Circuit Court of Appeals upon which the Petitioner seeks review in this Court by certiorari.

ARGUMENT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT THAT "THE PROCEDURAL VALIDITY OF THE UNDERLYING ASSESSMENT HAS NO BEARING ON THE FACT THAT THE DISCLOSURES WERE MADE FOR A PURPOSE CLEARLY AUTHORIZED BY SECTION 6103(k)(6)" IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS OF APPEALS

IRC, § 7431(a)(1) provides a statutory action for damages when an employee of the United States makes an unauthorized disclosure of return and return information. In determining liability, the appellate Courts have adopted two very distinct rules of construction in this section, with some minor variations within these two rules. The Petitioner will refer to these two rules as the "confidentiality test" and the "validity test."

The "confidentiality test" generally bars damages under IRC, § 7431 for a disclosure of return and return information, even when the disclosure is invalid at the time it is made, if there has been a previously valid disclosure of the same information. These courts have concluded that "Once tax return information is made a part of the public domain, the information is no longer confidential." See *William E. Schrambling Accountancy Corp. v. United States*, 937 F.2d 1485 (9th Cir., 1991); *Lampert v. United States*, 854 F.2d 335 (9th Cir., 1988) *cert. denied*, 490 US 1034, 109 S.Ct 1931, 104 L.Ed.2d 403 (1989); *United States v. Posner*, 594 F. Supp. 930, 936 aff'd on other grounds 764 F.2d 1535 (11th Cir., 1985); *Thomas v. United States*, 671 F.Supp 15, aff'd 890 F.2d 18 (7th Cir., 1989)[4];

4/ *Thomas*, supra, at 21 did not retreat from the Seventh Circuit's "...statement in *Wiemerslage v. United States*, 838 F.2d 899, 902 (1988), that the statute is a 'general prohibition against the disclosure of tax return information (continued...)

The "validity test" is based on the premise that return and return information is confidential until there is some authority to make the disclosure when the disclosure is made and damages are proper even if a previous valid disclosure was made. *Mallas v. U.S.*, 993 F.2d 1111 (4th Cir., 1993); *Johnson v. Sawyer*, 980 F.2d 1490 (5th Cir., 1992) amended 4 F.3d 369 (5th Cir., 1993); *Barrett v. United States*, 795 F.2d 446 (5th Cir., 1986); *Rorex v. Traynor*, 771 F.2d 383 (8th Cir., 1985); *Rogers v. Hyatt*, 697 F.2d 899 (10th Cir., 1983); *accord, Chandler v. United States*, 687 F.Supp. 1515, aff'd 887 F.2d 1397 (10th Cir., 1989) (per curiam).

In *Mallas*, supra, at 1120-21, in the strongest language to date and in rejecting government's attempt to have that Court adopt the Ninth Circuit's construction in *Schrambling* and *Lampert*, the Fourth Circuit reached the following conclusion;

> "Despite its lack of statutory support, the Government urges us to join the Ninth Circuit in holding that once return information is within the public domain, it loses section 6103 protection. (citation and quotes omitted) As the Government notes, however, at least one circuit has reached a contrary conclusion. See *Rogers v Hyatt*, 697 F.2d 899, 906 (10th Cir., 1983) ("The issue ... is not the loss of 'confidentiality' or 'privacy' but rather whether ... [the IRS] made an unauthorized disclosure of return information...") (cite omitted)
>
> The government argues that "the Tenth Circuit erred" and that "[t]he Ninth Circuit's analysis strikes a better balance between the Government's legitimate interests in disclosing return information to administer the tax laws and a taxpayer reasonable expectation of privacy." Government's Br. at 36. **It is for Congress**, however,

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4/(...continued)

> **unless expressly authorized by an exception**.'" [(quote in original) (emphasis added)

> **not this Court** to "strike a balance" between these interests. Congress has done so in section 6103, without articulating the exception advanced by the Government in this litigation and adopted by the Ninth Circuit in *Lampert* and *Schrambling*. Indeed, the Ninth Circuit essentially concedes that its approach hews less closely to the text of section 6103 than does our contrary construction. *See Lampert*, 854 F.2d at 338 (conceding that "a strict technical reading of the statute supports the taxpayer's position" that public availability does not eliminate need for specific statutory exception)" [(emphasis added) (quotes and italics in original)]

The Ninth Circuit's decision in this action directly conflicts with *Mallas*; *Johnson*; *Barrett*; *Rorex*; *Rogers*; and *Chandler*, all supra. It is also important to note that the Ninth Circuit did not follow its own precedent and determine the existence of its own prerequisite for determining liability under IRC, § 7431. The Court previously stated that "[a] prerequisite to liability under Section 7431, therefore, is the confidentiality of the disclosed information." *Schrambling*, supra, at 1488; *Lampert*, supra, at 338. Had the Ninth Circuit taken that first step it would have found that the Petitioner's return and return information would have still been confidential.

The Ninth Circuit stated in its January 24, 1994 memorandum that "[t]he procedural validity of the underlying assessment has no bearing on the fact that disclosures were made for a purpose clearly authorized by section 6103(k)(6)" *citing, Hughes v. United States*, 953 F.2d 531, 542 (9th Cir., 1992); *Maisano v. United States*, 908 F.2d 408, 410 (9th Cir., 1990) (App. A, Pg. A-3). While these cases are factually distinguishable, in that the Court found that the IRS was collecting **valid** assessments, the appellate Court was incorrect in relying on IRC, § 6103(k)(6) as the basis for authorizing the disclosures to collect the assessments. IRC, § 6103(k)(6) **only** authorizes a revenue officer or employee to "disclose return information to the extent

that such disclosure is **necessary in obtaining information**." (emphasis added) *DiAndre v. U.S.*, 968 F.2d 1049, 1052 (10th Cir., 1992); *Rogers v. Hyatt*, supra, at 904. It does not permit disclosures while actually collecting the assessment.

Finally, the Ninth Circuit has even rendered conflicting opinions within the Circuit itself. In *William C. Blankstyn v. United States*, 91-16625 in a February 22, 1993 decision (noted at 988 F.2d 117 (Table)) a different panel in the Ninth Circuit reversed and remanded the dismissal of an action under IRC, § 7431. (App. F, Pg. A-25 to A-26). His action was based upon a claim that the disclosure of return information is unauthorized if it is made to collect an assessment that is not recorded in accordance with IRC, § 6203 and 26 CFR, § 301.6203-1.

Weiner v. I.R.S, 986 F.2d 12 (2nd Cir., 1993) (plaintiff may not sue for unlawful disclosure of her confidential tax information because "computer error" by IRS employees does not amount to knowing or negligent disclosure by United States employee) is the only published opinion which appears facially to be in conflict with the Fourth, Fifth, Eighth and Tenth. However, *Weiner*, supra, and the case before this Court are factually distinguishable. The disclosures in were found to be the result of a "computer error." *Weiner*, at 13. Even the Respondent would have to concede that record of this case shows that the disclosures were not the result of a "computer error." The disclosures were a continuous course of missteps, whether wilfully or negligently, by each and every agent involved, beginning with the agent who caused the Notice of Deficiency to be mailed to an address that was not the "last known address" of the Petitioner and ending with a seizure after agents ignored letters and warnings from the Petitioner that the assessment and lien was invalid. A fact, as already noted, the Respondent admitted to in the Court of Appeals.

Accordingly, and for the reasons set forth above, this Court should grant the Writ of Certiorari to the Ninth Circuit Court of Appeals.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT THAT "THERE IS NO EVIDENCE IN THE RECORD TO INDICATE THAT THE DISCLOSURES, ALTHOUGH ERRONEOUS, WERE NOT MADE IN GOOD FAITH" IS IN CONFLICT WITH THE DECISIONS OF SEVERAL OTHER UNITED STATES COURTS OF APPEALS

IRC, § 7431(b) provides that "[no] liability shall arise under this section with respect to any disclosure which results from a good faith, but erroneous, interpretation of section 6103." This section does not provide a general "good faith" defense, but a defense based upon an erroneous interpretation of IRC, § 6103.

A plaintiff need not plead that the disclosures were made in "bad faith." In order to state a claim under IRC, § 7431(a), the "complaint need allege only the elements of the claim for relief." *Hrubec v. National Railroad Passenger Corporation*, 981 F.2d 962, 964 (7th Cir., 1992), *citing, Gomez v. Toledo*, 446 US 635, 64 L.Ed.2d 572, 100 S.Ct 1920 (1980).

The good faith defense under IRC, § 7431(b) should be judged by an objective standard analogous to that in *Harlow v. Fitzgerald*, 457 US 800, 73 L.Ed.2d 396, 102 S.Ct 2727 (1982). *Diamond v. U.S.*, 944 F.2d 431, 435-36 (8th Cir., 1991); *Huckaby v. United States Dept. of Treasury, IRS*, 794 F.2d 1041, 1048 (5th Cir., 1986); *Rorex v Traynor,* supra, at 387.

In light of this objective standard, did the disclosures made in recording the lien and sending and publishing the Notices of Sale violate a clearly established statutory right of which a reasonable person would have known? In *Anderson v. Creighton*, 483 US 635, 640, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987) this Court gave guidance as to when a right is "clearly established."

> The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say that an

> official action is protected by qualified immunity unless the very action has previously been held unlawful (*cites omitted*); but it is to say that in the light of preexisting law the unlawfulness must be apparent. (*cites omitted*)

As the Petitioner discussed in Argument I, ante, no less than four (4) circuits have found that disclosure of return and return information is not authorized, when a mandatory statutory or internal administrative procedure that is a prerequisite to the disclosure is not followed. Not even the Ninth Circuit was in conflict with this principle until its decision in this case.[5] The Petitioner proved, based upon the facts and the prevailing state of the law that a "clearly established" statutory right was violated. That is assuming of course that the procedural validity of the underlying assessment can somehow result in a "good faith, but erroneous, interpretation of section 6103."[6]

Nonetheless, the requirement by both the district Court (App C., Pg. 14) and the Ninth Circuit (App. A, Pg. A-13)[7] that the

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5/ As the Petitioner discussed *Hughes*, supra, and *Maisano*, supra are not to the contrary of the Fourth, Fifth, Eighth and Tenth *per se*, in that the decisions in *Hughes* and *Maisano*, were buttressed by the finding that the underlying assessments were valid.

6/ In light of the admission by the Respondent and the finding by the Ninth Circuit that the Notice of Deficiency was not sent to the Petitioner's "last known address" and in light of the rigors of due process embodied in the statutory scheme involved in this case, in that IRC, § 6213(a) provides that "**no assessment** of a deficiency ... and **no levy** or proceeding in Court for its collection shall be made, until such notice **has been mailed**," to say or argue that the disclosures, that were made for the collection an assessment that is **prohibited by statute from even existing**, were the result of a "good faith, but erroneous, interpretation of section [6103(k)(6)]" is stretching if not specious.

7/ As noted above the Ninth Circuit stated "there is no evidence in the record to indicate that the disclosures, although erroneous, were not made in good faith." This is of course the negative of "were made in 'bad faith.'" In either case both the district Court and the Ninth Circuit incorrectly shifted (continued...)

Petitioner establish "bad faith" before the Respondent establishes its defense that it otherwise acted in "good faith" is in conflict with the other circuits that have discussed the matter.

> Whether "bad faith" plays any role at all is a question we need not answer. Section 7431(a)[(1)][8] makes it wrongful to disclose tax returns "knowingly or negligently." The district court [or the Ninth Circuit for that matter] did not attempt to reconcile its "bad faith" standard with the language of § 7431(a)[(1)]. Instead it relied on § 7431(b). Yet this subsection addresses a situation--"a good faith, but erroneous, interpretation of section 6103"--that will **be irrelevant** in many cases. Until the defendants signify that they relied on some interpretation of § 6103, the issue does not arise. What would the district court have the plaintiff plead? That the defendants did not rely on § 6103? That they did rely, but not in good faith? Until discovery, how would the plaintiff tell? Whoever bears the burden of persuasion on good faith, the defendants are the logical parties to introduce the issue, and they have not done so in this case. [(emphasis added) (bracketed text added)] *Hrubec*, supra, at 964.

The Respondent did not properly introduce the issue in this case. The decisions of both the district Court and the Ninth Circuit clearly show that the Respondent made the disclosures **simply because the Respondent believed there was a valid assessment**. A fact which the Respondent admits is no longer true. There is nothing in the decisions by either the district Court, the Ninth Circuit or entered into the record by the

---

7/(...continued)

the burden of proving 'bad faith,' before the Respondent properly plead a "good faith, but erroneous, interpretation of section 6103."

8/ Section 7431(a)(2) in original.

Respondent to show that the disclosures were the result of someone's "good faith, but erroneous, interpretation of Section 6103." Like the Court in *Hrubec*, supra, the Ninth Circuit should not have answered the question or should have answered in favor of the Petitioner and remanded this case back to the district Court. Because it did not the Ninth Circuit set itself up in conflict with other circuits.

Accordingly, and for the reasons set forth above, this Court should grant the Writ of Certiorari to the Ninth Circuit Court of Appeals.

CONCLUSION

The Ninth Circuit's decision in this case did not follow either of the conflicting "tests" for determining liability under IRC, § 7431. The decision was based upon a completely new theory. This new theory that IRC, § 6103(k)(6) authorizes disclosures of return and return information while collecting an admittedly invalid assessment is in conflict with at least 4 circuits. The Ninth Circuit's decision that the Petitioner has the burden of proving "bad faith," before the Respondent properly pleads and produces evidence that the disclosures were the result of "good faith, but erroneous, interpretation of section 6103," is likewise in conflict with other circuits.

In short, the Petitioner has been denied the statutory remedy that Congress has provided for under IRC, § 7431 simply because he lives in the Ninth Circuit **and for no other reason**. Had the Petitioner lived in one of the districts covered by the fourth, fifth, eighth, and tenth and possibly even the seventh or eleventh, this action would have long been resolved in the Petitioner's favor. Instead this case has now entered it fifth year.

What good is a remedy, statutory or otherwise, if the Courts are not going to properly enforce the right provided for? It is for the Congress to grant or deny such statutory remedies. A right provided for by statute can only be denied by its repeal. It is not for the Courts to decide who should be denied the

remedy. To date it has not been the Congress that has denied the Petitioner his remedy, because that right is specifically defined in IRC, § 7431. It has been the courts and only the courts that have denied the Petitioner his just remedy.

This Court has for almost ten years been avoiding resolving the conflicts between the circuits for this remedy. It is time for this Court to act. The Petitioner has no other avenue to obtain the relief requested should this Court decline. This Petitioner submits that it would be **an abuse of this court's discretion** to deny certiorari to the Ninth Circuit Court of Appeals.

Accordingly, and with the heartfelt belief that God will direct this Court to exercise its discretion and permit the Petitioner to continue the pursuit of the remedy that Congress has provided for, the Petitioner prays for the Lord's guidance upon this Court in its deliberation and that HE will guide this Court to issue the Writ of Certiorari to the Ninth Circuit Court of Appeals.

RESPECTFULLY SUBMITTED this 29th day of July, 1994.

JIMMY C. CHISUM
3310 WEST BELL ROAD #1008
Phoenix, Arizona 85023
(602) 465-7850
Petitioner, In Propria Persona

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NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JIMMY C. CHISUM,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX

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APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIMMY C. CHISUM,	)	No. 91-16934
	)	
Plaintiff-Appellant,	)	D.C. No. CV-90-00549-CAM
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM*
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, District Judge, Presiding

Submitted September 1, 1993**
Filed September 13, 1993
Withdrawn January 24, 1994

Before: FLETCHER, POOLE, AND O'SCANNLAIN, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Dir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, appellee's request for oral argument is denied.

Jimmy C. Chisum appeals pro se the district court's summary judgment for the United States in Chisum's action alleging that the Internal Revenue Service ("IRS") wrongfully disclosed tax information in violation of 26 U.S.C. §7431(a)(1). We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

We review de novo the district court's grant of summary judgment. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 539 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992).

Section 6103 of the Internal Revenue Code provides that income tax returns and return information are confidential. 26 U.S.C. § 6103; Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990). Section 7431 provides a civil cause of action for damages for the intentional or negligent disclosure of confidential return information by officers or employees of the United States. 26 U.S.C. § 7431; Maisano, 908 F.2d at 410. Section 6103(k), however, authorizes the IRS to disclose return information if necessary for the collection of tax liability. 26 U.S.C. § 6103(k)(6), Under section 301.6103(k)(6)-1(b) of the Treasury Regulations, the IRS may disclose return information "to apply the provisions of the Code relating to the establishment of liens against [the taxpayer's] assets, or [a] levy on . . . the assets to satisfy any [outstanding tax] liability." Treas. Reg. § 301.6103(k)(6)-1(b)(6); Maisano, 908 F.2d at 410. Additionally, under section 7431(b), there is no liability for "any disclosure which results from a good faith, but erroneous, interpretation of section 6103." 26 U.S.C. § 7431(b).

Here, the IRS disclosed Chisum's tax return information by recording a tax lien against Chisum and issuing a notice of sale of Chisum's property, both to satisfy his tax obligation. Chisum argues that these disclosures nevertheless were unauthorized

under section 7431 because the underlying tax assessment was procedurally invalid. Specifically, Chisum claims that the assessment was invalid because the statutory notice of deficiency was not mailed to his last known address.

The government concedes error in the mailing of the notice of deficiency and states that therefore the assessment and tax lien against Chisum were improper and subsequently released. The government argues, however, that although the assessment and lien were invalid, the resulting disclosures of Chisum's tax information are not actionable under section 7431 because the disclosures were only erroneous and not unauthorized.

It is undisputed that the disclosures of Chisum's tax information were made in connection with tax collection activities. The procedural validity of the underlying assessment has not bearing on the fact that the disclosures were made for a purpose clearly authorized by section 6103(k)(6). See 26 U.S.C. §6103(k)(6); Hughes v. United States, 953 F.2d 531, 542 (9th Cir. 1992); Maisano, 908 F.2d 410. Moreover, there is no evidence in the record to indicate that the disclosures, although erroneous, were not made in good faith. See 26 U.S.C. 7431(b). Accordingly, the district court did not err by granting summary judgment for the United States. [1/]

AFFIRMED.

1/ Because we hold that summary judgment for the United States was proper on the merits of Chisum's claims, we do not address the district court's alternative finding that Chisum's action was time-barred.

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APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
SEP 13 1993

JIMMY C. CHISUM,	)	No. 91-16934
	)	
Plaintiff-Appellant,	)	D.C. No. CV-90-00549-CAM
	)	
v.	)	
	)	
UNITED STATES OF AMERICA,	)	MEMORANDUM*
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States District Court
for the District of Arizona
C.A. Muecke, District Judge, Presiding

Submitted September 1, 1993**

Before: FLETCHER, POOLE, AND O'SCANNLAIN, Circuit Judges.

---

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Dir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, appellee's request for oral argument is denied.

Jimmy C. Chisum appeals pro se the district court's summary judgment for the United States in Chisum's action alleging that the Internal Revenue Service ("IRS") wrongfully disclosed tax information in violation of 26 U.S.C. §7431(a)(1). We have jurisdiction under 28 U.S.C. §1291, and we affirm.

We review de novo the district court's grant of summary judgment. Kruso v. International Tel. & Tel. Corp., 872 F.2d 1416, 1421 (9th Cir. 1989), cert. denied, 496 U.S. 937 (1990). Viewing the evidence in the light most favorable to the non-moving party, we must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant law. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 539 (9th Cir. 1991), cert. denied, 112 S. Ct. 1603 (1992).

Section 6103 of the Internal Revenue Code provides that income tax returns and return information are confidential. 26 U.S.C. § 6103; Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990). Section 7431 provides a civil cause of action for damages for the intentional or negligent disclosure of confidential return information by officers or employees of the United States. 26 U.S.C. § 7431; Maisano, 908 F.2d at 410. Section 7431(d) provides that an action under section 7431(a) must be brought "within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure." 26 U.S.C. §7431(d).

Here, the IRS disclosed Chisum's tax return information by recording a tax lien against Chisum and issuing a notice of sale of Chisum's property, both to satisfy his tax obligation. The tax lien was recorded in December 1986 and a notice of the lien was received by Chisum on December 23, 1986. The IRS issued a notice of sale of Chisum's property on March 21, 1988, and Chisum concedes that he received this notice on or about that date. Chisum, however, did not file the present action until April 10, 1990, more than two years after discovery of the alleged unauthorized disclosures. Accordingly, the district court

did not err by dismissing his action as time-barred. See 26 U.S.C. §7431(d). [1/]

AFFIRMED.

1/ Because we hold that summary judgment for the United States was proper on the ground that Chisum's action was time-barred, we do not address the district court's alternative findings on the merits of Chisum's claims.

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APPENDIX C

FILED
DEC 10 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JIMMY C. CHISUM,	)	
	)	No. CIV 90-0549
Plaintiff,	)	PHX CAM
	)	
vs.	)	ORDER
	)	
UNITED STATES OF AMERICA,	)	
	)	
Defendant.	)	
	)	

Having considered the defendant's motion for summary judgment and plaintiff's motion for partial summary judgment, the Court concludes as follows:

Background

The following acts are undisputed by the parties. Plaintiff last filed an individual income tax return in 1981 with an address of 4544 Continental Drive, Glendale, Arizona 85308. DSOF 1-2. Plaintiff's address on his 1981 W-2 form that was attached to his 1981 return was 2221 West Maple, Phoenix, Arizona. DSOF 3. In 1984, plaintiff corresponded with the IRS and Secretary of Treasury using an address of P.O. Box 14955, Phoenix, Arizona 85963. DSOF 4; PSOF 6-8. On or about February 20, 1984, plaintiff received a Notice of Assessment of $500 from the IRS. PSOF 9. The Notice of Assessment had been mailed to the P.O. Box address. PSOF 9. On or about March 21, 1984, plaintiff received a Final Notice and Demand for Payment of the penalty. PSOF 10. That notice was mailed to the Continental Drive address. PSOF 10. On or about May

9, 1984, plaintiff received a second Final Notice and Demand for Payment of the penalty. PSOF 11. This notice was also mailed to the Continental Drive address. On July 9, 1984, the IRS served a Notice of Levy on plaintiff's employer to collect the penalty. PSOF 11.

On April 17, 1985, pursuant to 26 U.S.C. §6020(b), the IRS prepared a substitute return for plaintiff for the tax year 1983. DSOF 5. The IRS used the P.O. address for the substitute return. DSOF 5. The IRS mailed the notice of deficiency to plaintiff at the P.O. Box address on May 24, 1985. DSOF 6; PSOF 13.

In December of 1986, the IRS filed a Notice of Federal Tax Lien in the Maricopa County Recorder's Office. DSOF 7; PSOF 15. This Notice identified the plaintiff and set forth the amount of liability assessed against him. DSOF 8. On December 24, 1986, plaintiff received a Notice of Intention to Levy. DSOF 9. On or about December 23, 1986, plaintiff received a Final Notice for the tax deficiency for the 1983 tax year. PSOF 16. The notice was mailed to the Continental Drive address. PSOF 16.

On or about March 21, 1988, the IRS issued Notices of Sealed Bid Sale. DSOF 10. These Notices of Seal (sic) Bid Sale identified the plaintiff and stated that a tax liability possibly existed against him. DSOF 11. Plaintiff received the Notices of Sealed Bid Sale on or about March 21, 1988. PSOF 18. On April 11, 1988, a Notice of Sealed Bid Sale was published in the Phoenix Business Gazette. DSOF 12; PSOF 19. On April 10, 1988 and April 12, 1988, a Notice of Sealed Bid Sale was published in the Arizona Republic and Phoenix Gazette. DSOF 12; PSOF 19-20. The published Notice of Sealed Bid Sale identified plaintiff and stated that a tax liability possibly existed against him. DSOF 13.

Plaintiff filed this action on April 10, 1990, and amended his complaint on July 19, 1990 alleging wrongful disclosure of tax return information pursuant to 26 U.S.C. §7431. Specifically, plaintiff alleges three wrongful disclosures: (1) a Notice

of Federal Tax Lien filed in the Maricopa County Recorder's Office on or about December 19, 1986; (2) a Notice of Sealed Bid Sale mailed on or about March 21, 1988 and (3) publication of the Notice of Sealed Bid Sale in the newspaper on or about April 10, 1988. These three alleged disclosures were attempts by the IRS to collect on the tax liability. The defendant filed a motion for summary judgment asserting that plaintiff fails to state a claim upon which relief can be granted under 26 U.S.C. §7431. Plaintiff has filed a motion for partial summary judgment alleging that the assessments against him were invalid. There are no material issues of fact in this case.

I. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

A. Is summary judgment proper against the plaintiff as his claims are barred by the statute of limitations?

Defendant argues that plaintiff's claims are barred by the statute of limitations. Plaintiff brings this action pursuant to 26 U.S.C. §7431. Section 7431 provides that any action brought pursuant to 26 U.S.C. §7431 must be brought "within 2 years after the date of discovery by the plaintiff of the unauthorized disclosure." 26 U.S.C. §7431(d).

The first alleged disclosure was the Notice of Federal Tax Lien filed in the Maricopa County Recorder's Office on or about December 19, 1986. The undisputed facts establish that the plaintiff received the IRS Notice of intention to levy on December 24, 1986. DSOF 9. Plaintiff received notice of the second and third alleged disclosures when he received the Notice of Sealed Bid Sale on March 21, 1988. PSOF 18. This action was not filed until April 10, 1990. Because this suit was filed more than two years after plaintiff received notice of all three of the alleged unauthorized disclosures, his claims are barred by the statute of limitations and summary judgment is proper for the defendant.

B. Is summary judgment proper for the defendant, because the disclosures were authorized pursuant to 26 U.S.C. §6103(k)(6)?

Defendant further argues that the disclosures were clearly authorized by §6103(k) and its implementing regulations. Plaintiff brings that action pursuant to 26 U.S.C. §7431 which provides in relevant part:

> (a) In General. --
>
> (1) Disclosure by employee of United States.--If any officer or employee of the United States knowingly, or by reasons of negligence, discloses any return or return information with respect to a taxpayer in violation of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.
>
> (b) No Liability for Good Faith but Erroneous Interpretation.--No liability shall arise under this section with respect to any disclosure which results form (sic) a good faith, but erroneous, interpretation of section 6103.

Section 6103(k)(6) is an exception to the confidentiality requirement which allows IRS officer and employees to make disclosures or return information to the extent necessary to locate assets and satisfy tax liabilities through liens, levies, seizures and sales. Section 6103(k)(6) specifically provides:

> 9k) Disclosure of Certain Returns and Return Information for Tax Administration Purposes. --
>
> * * *
>
> (6) Disclosure by internal revenue officers and employees for investigative purposes.--An internal revenue officer or employee may, in connection with his official duties relating to any audit, collection activity, or civil or crimi-

> nal tax investigation or any other offense under the internal revenue laws, disclose return information to the extent that such disclosure is necessary in obtaining information, which is not otherwise reasonable available, with respect to the correct determination of tax, liability for tax, or the amount to be collected or with respect to the enforcement of any other provision of this title. Such disclosures shall be made only in such situations and under such conditions as the Secretary may prescribe by regulation.

Federal regulations allow disclosures in order to obtain information to:

> establish or verify the financial status or condition and location of the taxpayer against whom collection activity is or may be directed, to locate assets in which the taxpayers (sic) has an interest, to ascertain the amount of any liability . . . to be collected, or otherwise to apply the provisions of the Code relating to establishment of liens against such assets, or levy on, or seizure, or sale of, the assets to satisfy any such liability.

26 C.F.R. §301.6103(K)(6)-1(b)(6).

The undisputed facts establish that the three alleged disclosures were attempts by the IRS to collect the alleged tax deficiency. Such disclosure is allowed by §6103(k)(6) and 26 C.F.R. §301.6103(K)(6)-1(b)(6). Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990).

Moreover, the disclosures were authorized by §6323(f) and §6331 as necessary to effectuate notices of lien and levy. Section 6323(f) and 26 C.F.R. §301.6323(f)-1 expressly authorize the filing of a notice of tax lien in state county (sic) and federal offices. Such notice is filed on IRS Form 668 (Notice

of Federal Tax Lien under Internal Revenue Laws) which identifies the taxpayer, the tax liability giving rise to the lien and the date of the assessment. 26 C.F.R. §301.6323(f)-1(c)(1) and (2). Section 6331 authorizes the Secretary of Treasury to collect unpaid taxes by levying upon the taxpayer's property or rights in property.

Because the disclosures were authorized disclosures under the statute, they are not improper disclosures for which the government is liable and summary judgment is proper for the defendant.

II. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiff alleges in his motion that he is entitled to partial summary judgment that the assessments against him were invalid because of procedural defects. defendant correctly responds that plaintiff may not obtain a judicial determination of the validity of the assessment in the context of this §7431 action. Elias v. Connett, 908 F.2d 521 (9th Cir. 1990)(plaintiff cannot challenge the validity of an assessment in a §2410(a) action); Elias v. United States, 67 A.F.T.R. 2d 91-328, 91-438 (C.D. Cal. 1990)(the propriety of the underlying assessment cannot be collaterally challenged in an unlawful disclosure action filed pursuant to §7431).

Moreover, no liability arises under the statute for a good faith interpretation of Section 6103. 26 U.S.C. §7431(b). Pursuant to §7431(b), bad faith is an element that plaintiff must prove in his cause of action and he must plead facts sufficient to establish bad faith. Davidson v. Brady, 732 F.2d 552, 553 (6th Cir. 1984). Plaintiff has not show any facts to establish bad faith or that the disclosures were not made in good faith or that a genuine issue of material fact exists regarding the good\bad faith of the government. Nor has plaintiff shown that IRS officials were aware of any potential procedural defects in the assessment. Thus, even if procedural defects existed in the assessment, plaintiff would not prevail in this action.

IT IS THEREFORE ORDERED THAT:

(1) The defendant's Motion for Summary Judgment **(DOC #35)** is granted.

(2) The plaintiff's Motion for Partial Summary Judgment **(DOC #43)** is denied.

(3) Plaintiff's motion to strike **(DOC #51-1)**/ motion for expenses **(DOC #51-2)** is denied.

(4) Plaintiff's motion to exceed page limit **(DOC #53-1)** is granted.

(5) Plaintiff's motion to strike **(DOC #61-1)**/ motion for expenses **(DOC #61-2)** is denied.

(6) Oral argument scheduled on plaintiff's motion for summary judgment for December 13, 1991 is vacated.

(7) Plaintiff's Motion to Continue Filing Date of Pretrial Order **(filed November 26, 1991)** is denied as moot.

Dated this 6 day of Dec., 1991.

/s/ C.A. Muecke
C.A. Muecke
U.S. District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

FILED
DEC 10 1991

JIMMY C. CHISUM,	)	
	)	
Plaintiff,	)	**JUDGMENT IN A CIVIL CASE**
	)	
vs.	)	
	)	No. CIV 90-0549
UNITED STATES OF AMERICA,	)	PHX-CAM
	)	
Defendant.	)	

[ ] **JURY VERDICT.** This action came before the Court for a Trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **DECISION BY COURT.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED the court having granted summary judgment in favor of the defendant, plaintiff take nothing; complaint and action are hereby dismissed.

December 10, 1991 RICHARD H. WEARE, CLERK

_____
Deputy Clerk

APPENDIX D

FILED
JAN 24, 1994
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIMMY C. CHISUM,	)	No. 91-16934
	)	
Plaintiff-Appellant,	)	D.C. No. CV-90-
	)	00549-CAM
v.	)	Arizona (Phoenix)
	)	
UNITED STATES OF AMERICA,	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: FLETCHER, POOLE, AND O'SCANNLAIN, Circuit Judges

The appellant's petition for rehearing is denied. The memorandum disposition filed September 13, 1993 is withdrawn. The clerk is directed to file the attached memorandum disposition.

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APPENDIX E

MEMORANDUM TO CLERK

FILED
MAY 11, 1994

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JIMMY C. CHISUM,	)	No. 91-16934
	)	
Plaintiff-Appellant,	)	D.C. No. CV-90-00549-CAM
	)	
v.	)	Arizona (Phoenix)
	)	
UNITED STATES OF AMERICA,	)	ORDER
	)	
Defendant-Appellee.	)	
	)	

Before: FLETCHER, POOLE, AND O'SCANNLAIN, Circuit Judges

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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APPENDIX F

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

WILLIAM C. BLANKSTYN,	)	No. 91-16625
	)	
	)	D.C. No. CV-91-00452-CAM
Plaintiff-Appellant	)	
	)	
v.	)	
	)	
UNITED STATES,	)	MEMORANDUM**
	)	
Defendant-Appellee.	)	
	)	

Appeal from the United States
District Court for the
District of Arizona
C.A. Muecke,District Judge,
Presiding

Submitted February 11, 1993 ***

** This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

*** The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4. Accordingly, we deny Blankstyn's request for oral argument.

Before: GOODWIN, SCHROEDER, and CANBY, Circuit Judges.

William C. Blankstyn appeals pro se the district court's dismissal of his action seeking injunctive relief and damages in connection with the Internal Revenue Service's (IRS) levy on his wages to collect taxes assessed against Blankstyn for tax year 1985. Blankstyn also appeals the district court's denial of his Fed. R. Civ. P. 59(e) motion. We have jurisdiction pursuant to 28 U.S.C. §1291. We affirm in part, vacate in part and remand.

I. BACKGROUND

Blankstyn filed a complaint in district court seeking to enjoin the IRS from levying on his wages and seeking damages for wrongful disclosure of return information. Blankstyn alleged that he never received a notice of deficiency for tax year 1985, and that the assessment was not properly made and recorded. Blankstyn alleged that the IRS's collection of taxes assessed for 1985 was therefore unlawful. Blankstyn sought a temporary restraining order, preliminary injunction, and permanent injunction to prevent IRS from levying on his wages to collect the 1985 tax assessment. Blankstyn also alleged that because the assessment was procedurally improper, the IRS's disclosure of return information in connection with the wage levy violated 26 U.S.C. §7431. Blankstyn sought damages for wrongful disclosure of return information and an injunction to prevent further wrongful disclosures.

On April 19, 1991, the district court held a hearing on #'s request for a preliminary injunction. At the conclusion of the hearing, the district court issued a preliminary injunction effective for 10 days and ordered supplemental briefing. On April 30, 1991, the district court issued an order (1) consolidating the motion for preliminary injunction with the trial on the merits, (2) treating the motion for preliminary injunction as a motion for permanent injunction, (3) denying the injunction, (4)

granting judgment for the United States, and (5) dismissing the action.

II. Injunction

The district court found that Blankstyn claim for injunctive relief was barred by the Anti-Injunction Act ("Act"), 26 U.S.C. §7421(a). The Act prohibits a taxpayer from bringing a "suit for the purpose of restraining the assessment or collection of any tax ...." Id. The Act is strictly enforced. See Maxfield v. United States Postal Serv., 752 F.2d 433, 434 (9th Cir. 1984); see also Bob Jones Univ. v. Simon, 416 U.S. 725, 736-37 (1974). Thus, ordinarily taxpayers are limited in district court "to suits for refund." United States v. Condo, 782 F.,2d 1502, 1506 (9th Cir. 1986).

There are several statutory exceptions and one judicial exception to the Act. See 26 U.S.C. §§6212(a), (c), 6213(a), 6672(b), 6694(c), 7426(a),(b)(1), 7429(b); Enochs v. Williams Packing & Navigation Co., 370 U.S. 1, 7 (1962). Under the judicial exception announced in Enochs, injunctive relief is available if the taxpayer can demonstrate that (1) under no circumstances could the government prevail, and (2) the taxpayer will be irreparably harmed in the injunction is not granted. Id.; see also Condo, 782 F.2d at 1506.

Blankstyn contends that he never received a notice of deficiency for tax year 1985 prior to the assessment and levy, and, therefore, his claim for injunctive relief was permitted by section 6213. This contention lacks merit.

Section 6213 provides that no assessment of a tax shall be made and no proceeding for collection shall begin until 90 days after the mailing of a notice of deficiency pursuant to section 6212. Section 6213 further provides: "[n]otwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court."

A notice of deficiency is valid if it is mailed to the taxpayer's last known address, even if it is never received by the taxpayer. Williams v. Commissioner, 935 F.2d 1066, 1067 (9th Cir. 1991); King v. Commissioner, 857 F.2d 676, 679 (9th Cir. 1988); Cool Fuel, Inc. v. Connett, 685 F.2d 309, 312 (9th Cir. 1982). A postal form certifying that a notice of deficiency has been mailed is sufficient, in the absence of contrary evidence, to establish that the notice was properly mailed. United States v. Zolla, 724 F.2d 808, 810 (9th Cir.) cert. denied, 469 U.S. 830 (1984).

Here, the IRS alleged that it properly mailed Blankstyn a notice of deficiency for tax year 1985. To support this claim, the IRS submitted (1) a copy of Blankstyn's notice of deficiency for tax year 1985, dated March 26, 1990 and properly addressed to Blankstyn at his last known address, (2) the certified mailing list of notices of deficiency sent by the Ogden Service Center on March 26, 1990 (Form 3624), which listed the certified mail number for Blankstyn's notice, and (3) a copy of the envelope in which the notice was mailed, returned marked "unclaimed" by the post office. Given this evidence, the district court correctly found that the IRS had established that it had properly mailed the notice of deficiency to Blankstyn. See Williams, 935 F.2d at 1067; Zolla, 724 F.2d at 810. Further, the district court correctly found that Blankstyn's claim for injunctive relief under section 6213 was precluded because the notice was properly mailed, regardless of whether Blankstyn ever received it. See Cool Fuel, 685 F.2d at 312.

Blankstyn also contends that he is entitled to injunctive relief under the judicial exception to the Act. This contention lacks merit. Blankstyn failed to establish that under no circumstances could the government prevail. See Enochs, 370 U.S. at 7. Further, Blankstyn has an adequate remedy at law because he can pay the tax and file an action for refund. See 26 U.S.C. §7422. Finally, the district court correctly found that Blankstyn would not suffer irreparable harm without an injunction. See Enochs, 370 U.S. at 7; Elias v. Connett, 908 F.2d 521, 526 (9th

Cir. 1990) (financial hardship does not constitute irreparable harm).

III. Wrongful Disclosure

Blankstyn contends the district court erred by consolidating the trial on the merits of his wrongful disclosure claim with the preliminary injunction hearing and dismissing his wrongful disclosure claim. This contention has merit.

Section 6103 provides that income tax returns and return information are confidential. 26 U.S.C. §6103; Maisano v. United States, 908 F.2d 408, 410 (9th Cir. 1990). Section 7431 provides a taxpayer a civil cause of action for damages for the intentional or negligent disclosure of confidential return information by officers or employees of the United States. 26 U.S.C. §7431(a); Maisano, 908 F.2d at 410. Section 6103, however, authorizes the IRS to disclose return information if necessary for the collection of a tax liability. 26 U.S.C. §6103(k)(6); see Maisano, 908 F.2d at 410.

Here, Blankstyn alleged that because he did not receive a notice of deficiency and because the assessment was not properly recorded, the underlying assessment and lien were invalid and, therefore, the release of return information was unlawful. The district court correctly concluded that the IRS had established that the notice of deficiency was properly mailed and, therefore, that this allegation could not support a wrongful disclosure claim. Nevertheless, the district court failed to address Blankstyn's argument that no assessment was ever made. See 26 U.S.C. § 6203. The only evidence in the record regarding the assessment was a copy of the Summary Record of Assessment, which did not identify Blankstyn or the assessment made against him. Thus, the district court erred by dismissing Blankstyn's wrongful disclosure claim after the preliminary

injunction hearing. [1] See Hughes v. United States, 953 F.2d 531, 542 (9th Cir. 1992); Maisano, 908 F.2d at 410. Accordingly, we remand to the district court for further consideration of this claim. [2]

AFFIRMED in part, VACATED in part and REMANDED.

1/ Nevertheless, for the reasons discussed in section II above, Blankstyn was not entitled to injunctive relief on this claim.

2/ Given our disposition of this appeal, we need not consider whether the district court erred by denying Blankstyn's Rule 59( ) motion.

Supreme Court, U.S.
FILED
SEP 23 1994
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No. 94-204

In the Supreme Court of the United States

OCTOBER TERM, 1994

JIMMY C. CHISUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
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6 pp

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-204

JIMMY C. CHISUM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The petition in this case was not timely filed and the Court therefore lacks jurisdiction.

1. The first opinion of the court of appeals (Pet. App. A5-A7) was filed on September 13, 1993. That opinion affirmed the judgment of the district court dismissing petitioner's claim, on the ground that petitioner's suit was barred by the statute of limitations (*id.* at A6-A7). Petitioner thereafter filed a petition for rehearing. On January 24, 1994, the court of appeals denied the petition but withdrew the September 13, 1993, opinion and entered a new opinion, affirming the district court's decision on the merits rather than on the statute of limitations (*id.* at A1-A3, A17; see *id.* at A3 n.1). The opinion on rehearing did not vacate the earlier judgment of the court

of appeals affirming the district court. That judgment remained in effect (*id.* at A3, A7).

Petitioner filed a second petition for rehearing with suggestion for rehearing en banc on February 7, 1994. Petitioner contended in that petition that the court's January 24, 1994, decision on the merits was in error. That petition was denied by the court of appeals on May 11, 1994 (Pet. App. A19). The petition for a writ of certiorari was filed on August 1, 1994, invoking this Court's jurisdiction under 28 U.S.C. 1254(1). The petition for a writ of certiorari was filed more than 90 days after the denial of the first petition for rehearing and less than 90 days after the denial of the second petition for rehearing.

2. This Court noted in *Missouri* v. *Jenkins*, 495 U.S. 33, 45-46 (1990), that:

> Title 28 U.S.C. § 2101(c) requires that a petition for certiorari in a civil case be filed within 90 days of the entry of the judgment below. This 90-day limit is mandatory and jurisdictional. * * * Unless the * * * petition was filed within 90 days of the entry of the Court of Appeals' judgment, we must dismiss the petition.
>
> Since *Department of Banking of Nebraska* v. *Pink*, 317 U.S. 264 (1942), it has been the consistent practice of the Court to treat petitions for rehearing timely presented to the Courts of Appeals as tolling the start of the period in which a petition for certiorari must be sought until rehearing is denied or a new judgment is entered on the rehearing. * * * [W]hile the petition for rehearing is pending, there is no "judgment" to be reviewed.

See also Sup. Ct. R. 13.4.

In the present case, although the court of appeals revised its opinion in response to the first motion for rehearing, it did not alter its initial judgment in any fashion (Pet. App. A3, A7).[1] This Court has often noted that its "power is to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)). See also *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Accordingly, the "mere fact that a judgment previously entered is reentered or [is] revised in an immaterial way does not toll the time within which review must be sought." *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984), quoting *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

Under Rule 40(a) of the Federal Rules of Appellate Procedure, "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." The second rehearing petition in this case was not filed in compliance with this Rule; there is accordingly no basis for contending that the second rehearing petition further extended the time for filing a petition for a writ of certiorari. Because petitioner failed to file the petition for a writ of certiorari within 90 days of the denial of the first rehearing petition, the petition for a writ of certiorari is untimely and the Court therefore lacks jurisdiction.[2]

---

[1] The court also did not revise or amend its judgment in response to petitioner's second petition for rehearing.

[2] Because the petition is untimely and the Court therefore lacks jurisdiction, we have not responded to the petition on the merits. We will file a response on the merits if the Court requests.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

DREW S. DAYS, III
Solicitor General

SEPTEMBER 1994

Supreme Court, U.S.
FILED
OCT 12 1994
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(3)

NO. 94-204

In The Supreme Court of the United States

October Term, 1994

JIMMY C. CHISUM

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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Date: October 12, 1994

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ISSUES PRESENTED IN REPLY

1. Whether the Petition for Writ of Certiorari was timely filed.

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NO. 94-204

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JIMMY C. CHISUM,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Petitioner, Jimmy C. Chisum, hereby Replies in Support of his Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on January 24, 1994.

ARGUMENT

THE PETITION FOR THE WRIT OF CERTIORARI WAS TIMELY

The Respondent argues that the Petition for Writ of Certiorari was not timely, because the Ninth Circuit's January 24, 1994 memorandum disposition merely "revised" it's September 13, 1993 memorandum dispostion. In reaching this conclusion, the Respondent essentially interchanged the term "revised" with the term "withdrawn." The Ninth Circuit's January 24, 1994 Order states, in part (See Appendix to Petititon, Page A-17):

> "The memorandum **disposition** filed September 13, 1993 is **withdrawn**." (emphasis added)

The order clearly shows that the September 13, 1993 judgment was withdrawn and the new judgment on the merits was entered on January 24, 1994. While the decisions in both the September 13, 1993 and the January 24, 1994 affirmed the district Court's grant of summary judgment, each judgment was separate and distinct from the other.

This is clear from examination of both memoranda. The Court in the September 13, 1993 memorandum concluded that the action was time barred. Thus, the decision did not reach the merits of the case as noted by footnote one (1) at the end of the memorandum, which states to wit:

> "Because we hold that summary judgment for the United States was proper on the ground that Chisum's action was time-barred, we do not address the district court's alternative findings on the merits of Chisum's claims." (App., Pg. A-7)

In its January 24, 1994 memorandum, the Court decided the case on its merits and did not reach the case on the basis that the action was time-barred as noted by footnote one (1) at the end of the memorandum, which states to wit:

> "Because we hold that summary judgment for the United States was proper on the merits of Chisum's claims, we do not address the district court's alternative finding that Chisum's action was time-barred. (App., Pg. A-3)

The footnotes in each case clearly show that the judgments are distinct. Taking the totality of the entire record in the Ninth Circuit, it is clear that the September 13, 1993 judgment was superceded by the January 24, 1994. It was not merely revised but substantially altered the rights of the parties.

The Respondent's reliance on *FCC v. League of Women Voters*, 468 US 364 (1984) and *FTC v. Minneaplis-Honeywell Regulator Co.*, 344 US 206 (1952) is misplaced. Both are distinguishable from this case and tend support the Petitioner.

First, *FCC*, involved the timeliness of an appeal where the appeal was taken from an amendment to the judgment involving an award of attorney's fees. This Court merely recognised that an awared of attorneys fees '"is uniquely separable from the cause of action" that is settled by a court's judgment on the merits, and therfore a postjudgment request for attorney's fees' and thus would not suspend the time for bringing an appeal. (quotes in original). Id. at 287-88. n.10.

This Court in *FTC*, supra, held the FTC's petition for Writ of Certiorari was untimely, because FTC filed a memorandum with the appellate court for affirmance and enforcement of the uncontested parts I and II of the FTC's cease and desist order after the time for petitioning for rehearing from the original judgment had expired, where the "Final Decree" entered by the Appellate Court merely repeated the previous judgment. This Court declined to accept the FTC's memoranudm as a petition for rehearing or a motion to amend a previous judgment.

The January 24, 1994 judgment by the Ninth Circuit substantially changed its previous judgment of September 13, 1993. Had the Respondent continued from its quote of *FTC*, supra, at 211, it would have supported the conclusion that the Petition in the instant case was timely. This Court in *FTC*, supra went on to state that:

> "Only when the lower court changes matters of substance, or resolves a genuin ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, **in its second order, has disturbed or revised legal rights and obligations** which, by its prior judgment, had been plainly and properly settled. (emphasis added)
> Id. 211-12

A Court of Appeals can supercede its judgment. Id. at 211. In determining whether the Petition in this case was timely this Court should consider the following. A Court of Appeals enters judgment affirming a district Court. A timely petition for hearing is filed and denied and then a Petition for Writ of Certiorari is filed and denied. Shortly thereafter, the Court of Appeals *sua sponte* supercedes it judgment with a new judgment but still affirms the judgment of the district Court, on a legal theory in conflict with this Court. Under the Respondent's theory, the party affected by the superceding judgment could not petition for rehearing and could not petition this Court for review because the time for petitioning had expired with the original judgment.[1]

1/ The Petitioner is not aware of a time limit imposed upon a Court of Appeals to *sua sponte* supercede its previous judgment. If such a time limit exists then assume under the circumstances discussed, that the superceding judgment was entered within the imposed time limit.

The Ninth Circuit "disturbed or revised [the] legal rights" of the parties in its January 24, 1994 judgment. *FTC*, supra, at 212. To say otherwise ignores the obvious. Accordingly, the Petitioner was entitled to file his second Petition for Rehearing. It was filed within the time provided by Rule 40(a), Federal Rules of Appellate Procedure, for the January 24, 1994, judgment. Thus, the time for bringing the Petition for Writ of Certiorari was suspended until the Court of Appeals disposed of the Petition for Rehearing, because there was no "judgment" to be reviewed. *Missouri v. Jenkins*, 495 US 33, 46 (1990)[2]

Respectfully submitted this 12th day of October, 1994.

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2/ "A petition for rehearing is designed to bring to the panel's attention points of **law or fact** that it may have overlooked. Fed Rule App Proc 40(a). The panel is required to consider the contentions in the petition for rehearing, if only to reject them." *Jenkins*, supra, at 46 n.14. The Respondent offers no theory on how to bring the overlooked points of law or fact that were raised in the January 24, 1994 memoranudum dispostion. They could not be raised in the first petition for rehearing because the Court's September 13, 1993 judgment did not address the merits of the case.

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